CBS Broadcasting, Inc. *and* Writers Guild of Amerca, East, Inc. Case 2–CA–35421

December 8, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On June 29, 2004, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The General Counsel also filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified[1] and set forth in full below.

I. FACTUAL BACKGROUND

Since 1958, Writers Guild of America, East, Inc. (WGAE) and Writers Guild of America, west, Inc. (WGW) together have been the joint exclusive collective-bargaining representative (the joint representative) of a single nationwide unit of CBS newswriters, editors, and other employees located in New York, Chicago, Washington, and Los Angeles. A National Staff Agreement (National Agreement), which is supplemented by 11 agreements covering different localities and/or particular jobs (jointly, the collective-bargaining agreement), covers the unit. The most recent collective-bargaining agreement is effective from April 2, 2002, through April 1, 2005.[2]

Negotiations for the current collective-bargaining agreement took place primarily in New York.[3] The chief negotiator for the joint representative was Mona Mangan, executive director of WGAE. Final authority to accept or refuse the Respondent's proposals rested with the joint representative's bargaining committee, which was comprised of members both of WGAE and of WGW.

During the negotiations, the Respondent proposed adding to the National Agreement a sideletter covering future consolidations of operations by the Respondent. This proposal (proposal 7) would have given the Respondent unfettered discretion to alter terms and conditions of employment in order to deal with possible combinations or mergers of the Respondent's television operations covered by the National Agreement. The bargaining committee rejected proposal 7. The parties discussed an amended version of proposal 7, but were unable to reach agreement.

In an attempt to overcome the obstacle to final agreement proposal 7 created, the Respondent limited the scope of proposal 7 so that it covered only the pending combination of KCBS, the Respondent's Los Angeles television station, with KCAL, another television station in Los Angeles. After an all-night sidebar, during which Mangan, John McLean, executive director of WGW, and the Respondent's representatives Harry Isaacs and Leon Schulzinger negotiated the terms of the revised proposal 7, the bargaining committee accepted the new proposal, which was incorporated into the collective-bargaining agreement as sideletter 15 to the Los Angeles supplement to the National Agreement (sideletter 15).[4]

Several months after the parties reached agreement, and after the Respondent consummated the acquisition of KCAL and began preparing to combine the KCAL and KCBS newsrooms, Chuck Marchese, a WGW representative, scheduled a September 13 meeting with the Respondent to discuss WGW's concerns about the physical construction and certain personnel issues attendant to the combination of the newsrooms. The Respondent sought to use the meeting to voice its dissatisfaction with sideletter 15, and attempted to initiate negotiations to modify it. This took Marchese by surprise; he told the Respondent's representatives that he was neither prepared nor authorized to engage in the negotiations the Respondent contemplated.

[1] The General Counsel filed two cross-exceptions to correct errors in the judge's decision, which we grant. In part II, sec. A,3 of the decision, we correct the title of the referenced job from "writer/supervisor" to "writer/producer." We also correct the date of the Duopoly Agreement in the notice from "2003" to "2002." We have modified the judge's recommended Order and notice to more clearly reflect the violation found herein.

There are no exceptions to the judge's finding that the complaint was timely under Sec. 10(b).

[2] Unless stated otherwise, all dates are in 2002.

[3] One session was held in Los Angeles.

[4] The parties reached final agreement on April 7, 2002. After a lengthy period of conforming and proofreading the contract document, the current collective-bargaining agreement was signed on November 18, 2002, by the Respondent and by WGAE, "for itself and for its affiliate [WGW]."

Marchese notified McLean of what had happened at the September 13 meeting. McLean subsequently engaged in negotiations with the Respondent to modify sideletter 15. Those negotiations, which occurred in October, November, and December, principally concerned the issues of producers writing and whether they should be included in the unit. Other issues included (1) a 1-year moratorium on layoffs of unit employees and (2) accelerated pay parity for employees coming over from KCAL to join the unit.

Initially, no one notified WGAE that the negotiations were taking place. On or about November 8, Mangan received a telephone call from McLean, who told her that he had been talking to the Respondent about producers writing and about removing them from the unit. Mangan told him that he could not do that. On November 8, Mangan sent McLean the following e-mail:

> Please do not take any action to alter the WGA-CBS collective-bargaining agreement with regard to its scope or jurisdictional clauses or other provisions regarding producers writing. Any such change would fundamentally alter the collective-bargaining agreement. We should convene a national council meeting to consider such changes. You should not feel free to alter unilaterally the collective-bargaining agreement to which both east [and] west are signatory.

McLean told Schulzinger and Isaacs that Mangan objected to making any changes to sideletter 15;[5] the Respondent continued to negotiate with WGW despite WGAE's objections. Despite regular contact with WGAE during the relevant time period, the Respondent neither mentioned to WGAE, nor invited WGAE to participate in, the negotiations.

On December 20, Mangan sent the following e-mail to McLean:

> I . . . request[ed] that you not pursue bargaining with CBS without both parties participating. The contract states that the parties and employees will meet during the transition period and thereafter to discuss the plans, issues and questions related to the merger of th newsrooms. The Writers Guild of America, East is one of the parties. You may not bargain without us. . . . Please understand that you may execute nothing which impacts the collective-bargaining agreement.

Notwithstanding Mangan's continued objections, the Respondent and WGW entered into an agreement (the Duopoly Agreement) that revised sideletter 15. In pertinent part, the Duopoly Agreement created a new position—supervisory writer/producer—that was in the unit, but which was excluded from the arbitration process in case of discharge. McLean, on behalf of WGW, signed the Duopoly Agreement on December 31, and Schulzinger signed for the Respondent on January 6, 2003. At the hearing, Isaacs conceded that the creation of the supervisory writer/producer position was a "substantive" change to the collective-bargaining agreement.

II. ANALYSIS

We agree that the Respondent violated Section 8(a)(5) and (1) of the Act by bargaining solely with WGW and failing to bargain with WGAE as joint collective-bargaining representative of unit employees and, correspondingly, that it violated Section 8(a)(2) and (1).[6]

The Respondent was not privileged to negotiate the substantive change to the collective-bargaining agreement in the Duopoly Agreement solely with WGW. Employers have an obligation to bargain with joint representatives on a joint basis. See *International Paper*, 325 NLRB 689 (1998); *Allbritton Motors, Inc.*, 87 NLRB 193, 198 fn. 20 (1949). As such, employers are not privileged to bargain independently, much less to enter into a "substantive" modification of an existing collecting-bargaining agreement, with only one of the unions of a joint representative. See *California Nevada Golden Tours*, 283 NLRB 58 (1987) (employer violated Sec. 8(a)(1), (2), and (5) by negotiating and implementing a successor collective-bargaining agreement with one of the unions of a joint collective-bargaining representative); and see *Ozanne Construction Co.*, 317 NLRB 396 (1995), enfd. 112 F.3d 219 (6th Cir. 1997) (same). Because WGAE and WGW together were the joint exclusive collective-bargaining representative for the nationwide unit, including the Los Angeles newswriters, no substantive modification of the collective-bargaining agreement could be lawfully made without the assent of both unions of the joint representative.[7]

The Respondent's alleged "long history" of separate dealing with WGAE and WGW on nonsubstantive matters within their respective jurisdictions does not alter this conclusion. The judge correctly found that the instances in which the Respondent previously dealt with

[5] McLean testified that he told the Respondent that Mangan was not going to agree to negotiate. We find this substantially identical to the judge's finding on this issue.

[6] Member Meisburg notes that the Respondent did not file an exception contending that the finding of an 8(a)(2) violation was inappropriate if it were found to have violated Sec. 8(a)(5).

[7] The judge found a "substantive change" required the "active involvement of both unions." That is not required in every instance, however. One member of a joint representative may waive its rights or authorize another member to negotiate on behalf of the joint representative. *Pharmaseal Laboratories*, 199 NLRB 324 (1972).

one union alone generally related to nonsubstantive minor and individualized matters, such as extending the period for which temporary employees might be employed, or "buyouts" whereby an employee received a severance package different from that specified in the collective-bargaining agreement. It is undisputed that none of the prior instances of separate dealing involved the negotiation and execution of permanent, substantive modifications to the collective-bargaining agreement. Moreover, unlike the situation at issue here, for each of the examples of separate dealing the Respondent presented at the hearing, there was no evidence either (1) that the minor modification or adjustment of grievance was made without the knowledge or consent of the other union, or (2) that the Respondent had been informed that the other union objected to the minor modification or adjustment of the grievance. This history was insufficient to privilege the Respondent to negotiate independently with WGW on what the Respondent conceded was a "substantive" change to the collective-bargaining agreement.

We also agree with the judge's conclusion that WGAE did not waive its right to bargain by not requesting that the Respondent cease bargaining with WGW. It is well settled that any waiver of a representative's right to bargain must be "clear and unmistakable." *General Electric Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969), cert. denied 396 U.S. 1005 (1970). Far from making a "clear and unmistakable" waiver of its rights, WGAE repeatedly voiced to WGW its objections to the Respondent's negotiating with only one of the unions of the joint bargaining representative. Indeed, every overt manifestation of intent on the part of WGAE was to affirm and maintain its joint representative status. See *Ozanne Construction Co.*, supra. WGAE's objections were communicated to the Respondent, which nevertheless continued bargaining, to the point of agreement on a substantive change, solely with WGW.[8]

Our dissenting colleague argues that WGAE is estopped from asserting this claim because, based on the parties' prior history of separate dealing, the Respondent could reasonably believe that it could negotiate the Duopoly Agreement independently with WGW, and that, by failing to notify the Respondent of its specific objections, WGAE allowed the Respondent to rely on that belief. Our colleague overstates the case. As demonstrated above, the parties' prior history of separate dealing was insufficient to support a reasonable belief by the Respondent that it could bargain a substantive modification to the collective-bargaining agreement with only WGW.[9] Furthermore, WGAE repeatedly voiced its objections to WGW, and the Respondent was sufficiently apprised of those objections to be on notice that WGAE considered the negotiations to be in derogation of and inimical to the status of the Unions as joint representative.

Nevertheless, our colleague relies on the fact that WGAE never made its objections to the Respondent's separate negotiations with WGW *directly* known to the Respondent. But, as seen, WGW Executive Director McLean told Respondent Vice Presidents Isaacs and Schulzinger that WGAE Executive Director Mangan was not going to agree to negotiate over the Respondent's proposal to modify sideletter 15. Our colleague's characterization of WGW's notification to the Respondent as vague and secondhand is wrong on both counts. The Respondent knew well and clearly that WGAE objected to the Respondent's separate negotiations with WGW about the Respondent's proposal to modify sideletter 15. It is, thus, immaterial under these circumstances that Mangan did not communicate that objection *directly* to Isaacs or Schulzinger, and that McLean communicated it to them instead. The Respondent knew, in either event, that WGAE objected to these separate negotiations.

Consequently, we find no merit in our colleague's attempt to distinguish *California Nevada Golden Tours* and *Ozanne Construction*, supra, from the instant case on the grounds that WGAE did not directly contact the Respondent to *reaffirm* WGAE's status as a joint representative with WGW, or to admonish the Respondent that any bargaining with respect to the Respondent's proposal to modify sideletter 15 must be undertaken with WGW and WGAE jointly. Our colleague raises a factual distinction without a substantive difference.

Our colleague also relies on *Pharmaseal Laboratories*, supra, for his finding that the Respondent acted lawfully in negotiating separately with only WGW, over WGAE's express objections, about the Respondent's proposal to modify sideletter 15. Our colleague's reliance on

[8] Our dissenting colleague contends that WGAE's failure to object is "even more troubling in light of the negotiation history" of sideletter 15, which contemplated further discussions, and the understanding between Isaacs and McLean that they would work out later whatever was needed as the duopoly plan went forward. Mangan acknowledged this understanding. However, none of the negotiation history provides a reasonable basis for the Respondent to believe that it could negotiate a substantive change to the collective-bargaining agreement as it did in the Duopoly Agreement. Because it is not before us, we do not decide whether the Respondent and WGW could have lawfully negotiated a revision to sideletter 15 that did not include a substantive change to the collective-bargaining agreement. Nor do we decide whether WGAE could have lawfully refused to discuss the revisions to sideletter 15.

[9] As previously noted, under certain circumstances, such as those present in *Pharmaseal Laboratories*, supra, one of the unions of a joint representative may speak for the joint representative and negotiate an agreement. Those circumstances are not present here.

Pharmaseal to validate the Respondent's conduct is misplaced.

The issue in *Pharmaseal* was whether a collective-bargaining agreement that was actually signed by only one of the two jointly certified union representatives of the single bargaining unit nevertheless constituted a contract bar to the decertification petition in that case. The Board held in the circumstances of that case that the failure of one of the two locals *to sign* the collective-bargaining agreement did not prevent the agreement from acting as a bar to the decertification petition. The Board noted that in cases of joint certification, the joint representative constitutes a single party and, therefore, the signature of one of the two locals in *Pharmaseal acting on behalf of the joint representative* was all that was required to bind the two locals to the contract.

In *Pharmaseal*, the joint representative had been designated the negotiation chairman at the start of the negotiations, and the nonparticipating, nonsignatory local had expressed complete approval of the joint representative's contract proposal that was later to underlie the contract-bar issue in that case. The nonparticipating, nonsignatory local attended only the first and last of 25 bargaining sessions. Only after the negotiator accepted the employer's last offer did the nonparticipating, nonsignatory local try to withdraw the negotiator's authority. The acquiescent conduct of the nonparticipating, nonsignatory local in *Pharmaseal* clearly revealed it had authorized the other joint representative to conduct the negotiations and act on its behalf.

By contrast, here, WGW was clearly not authorized to negotiate for or act on behalf of WGAE, and was, thus, not acting on behalf of the joint representative. In light of the marked and substantial distinctions between *Pharmaseal* and the instant case, *Pharmaseal* does not support our colleague's result in this case.

Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(1), (2), and (5) of the Act by negotiating with WGW and executing the Duopoly Agreement with WGW.

ORDER

The Respondent, CBS Broadcasting, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with WGAE and WGW as the joint exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Staff Promotion Writer/Producers now or hereafter employed by the Respondent in New York or Los Angeles and staff Newswriters now or hereafter employed in New York, Chicago or Los Angeles for network, regional and/or local AM or FM radio and/or television broadcasts and staff News Assignment Deskpersons and Writers now or hereafter employed by the Respondent at its Washington, D.C. Network News Bureau, and staff News Editors now or hereafter employed by the Respondent in New York, and staff Desk Assistants and Clerk-Typists mow or hereafter employed by the Respondent in Chicago, and network staff Researchers now or hereafter employed by the Respondent in New York, and local Researchers now or hereafter employed by the Respondent in New York, and staff Graphic Artists now or hereafter employed by the Respondent in New York.

(b) Enforcing or giving effect to the Duopoly Agreement dated December 12, 2002, entered into with WGW.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with WGAE and WGW as the joint exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 8, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 8, 2004

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Contrary to my colleagues, I would dismiss the complaint in its entirety because I find that the joint representative is estopped from objecting to the Respondent's negotiation and execution of the Duopoly Agreement without Writers Guild of America, East, Inc.'s (WGAE) participation.

For the most part, the facts of this case are not in dispute, and are essentially as described by my colleagues. However, I disagree with their characterization, as "minor in nature," of the parties' past practice of direct dealing. The record demonstrated that the parties had a past practice whereby the Respondent dealt independently with each of the Unions on issues within their respective geographic jurisdictions.[1] The issues addressed by the Duopoly Agreement are local to Los Angeles and affect only those employees within WGW's jurisdiction. Further, there was no evidence that, prior to this occasion, mid-term modifications to the various local supplements that concerned local issues only had been negotiated on a joint basis. The record establishes that the Respondent could reasonably believe that it could deal directly with WGW on the local issues embodied in the Duopoly Agreement.

My colleagues emphasize the absence of evidence that prior direct dealings between the Respondent and the respective Unions took place without the knowledge—and over the objection—of the other Union. These points of distinction miss the mark because (1) it is undisputed that WGAE received, nearly 2 months prior to execution of the Duopoly Agreement, actual notice of the ongoing negotiations and (2) WGAE never made its objections to the negotiations known to the Respondent. Although WGAE based its objections to WGW on its status as joint representative, the objections as conveyed to the Respondent did not. All that was conveyed to the Respondent was, first, that Mona Mangan did not agree to negotiate and objected to changing sideletter 15, and, later, that Mangan didn't like the deal that WGW and the Respondent were contemplating. Notice of this vague objection, received secondhand from one of the Unions of the joint representative, was insufficient to preclude continuation of the negotiations between the Respondent and WGW.

In finding otherwise, the majority relies on *California Nevada Golden Tours*, 283 NLRB 58 (1987), and *Ozanne Construction Co.*, 317 NLRB 396 (1995), enfd. 112 F.3d 219 (6th Cir. 1997). The cases are distinguishable. In *California Nevada Golden Tours*, supra, two different Teamsters locals, 533 and 265, represented a single unit of busdrivers. Before negotiations began for a new collective-bargaining agreement, but after Local 533 notified the employer of its intent to modify the agreement, Local 265 notified the employer that it had "taken the position to negotiate the contract as a single bargaining unit." The employer agreed to do so. Soon thereafter, Local 533 notified the employer that it "expect[ed] and demand[ed] that all negotiation meetings involving successor labor agreement include, and take place in the presence [of], both Local 533 and Local 265, the jointly recognized bargaining representative." Local 533 later reiterated its demand to the employer that negotiations take place on a joint basis.

The Board adopted the judge's finding that "[d]espite being placed on notice by Local 533 that Local 265 and Local 533 were joint representatives and that Local 533 was only amenable to joint negotiations, [the employer] engaged in separate negotiations with Local 265 that resulted in a separate agreement" which covered only those drivers who were members of Local 265. *California Nevada Golden* Tours, 283 NLRB at 60. This bargaining violated the Act because Local 533 made "quite clear" its position that it was the joint representative and that any separate negotiations would be considered unlawful. Id. at 66.

Similarly, in *Ozanne Construction Co.*, supra, the judge found that the employer violated the Act when it engaged in separate negotiations with one of the unions of the joint representative over the explicit objection of the other union. In that case, the complaining union did not receive notice that the separate negotiations were being held until after they began. The judge found that, when the complaining union learned of the separate bargaining, "[its] reaction was . . . to reaffirm its status as joint representative and to admonish [the employer] that any bargaining with respect to a new agreement must be

[1] Union membership and contract administration was split along the Mississippi River, with WGAE administering the contract for all shops east of the river, Writers Guild of America, west, Inc. (WGW) for all shops west of the river, i.e., the Los Angeles shop.

undertaken on a joint basis." *Ozanne Construction Co.*, 317 NLRB at 398. The Board adopted the judge's finding that the union had not waived its right to participate in the negotiations under these circumstances, because "every overt manifestation of intent on the part of [the complaining union] was to affirm and maintain its joint representative status." Id.

The crucial facts present in *California Nevada Golden Tours*, supra, and *Ozanne Construction Co.*, supra, are not present here. Unlike the complaining unions in those cases, WGAE did not contact the Respondent to affirm its status as joint representative or to admonish the Respondent that any bargaining must be undertaken on a joint basis once it learned that the Respondent and WGW were negotiating the Duopoly Agreement. Rather, WGAE waited until March 2003, nearly 4 months after it received notice of the bargaining, and 2 months after it received a copy of the executed Duopoly Agreement, to notify the Respondent of its objection. No such delay was present in either *California Nevada Golden Tours* or *Ozanne Construction Co.* Accordingly, these cases do not support the majority's conclusion that the Respondent violated the Act.

WGAE's failure to make its objections known to the Respondent is even more troubling in light of the negotiating history surrounding the creation of sideletter 15 and the specific language of the sideletter. Proposal 7 started as a broad proposal, which would be part of the National Agreement, to address all such mergers. However, when the Union objected, the Respondent agreed to tailor the proposal to the specific merger of the newsrooms of the two Los Angeles stations. The decision to so narrow the scope of proposal 7 was made at the suggestion of John McLean, and he was actively involved in the negotiations leading to its execution. Additionally, sideletter 15, which called for "[t]he parties and employees to meet during the transition period and thereafter to discuss the plans, issues and questions related to the merger of the newsrooms," clearly contemplated additional discussions with respect to sideletter 15 and the KCAL-KCBS merger. Moreover, before agreeing to place sideletter 15 on the table, and because the Respondent lacked definitive information about the writing duties of the KCAL producers,[2] Harry Isaacs and McLean agreed with one another that they would work out whatever needed to be worked out later, based on information received as the duopoly plan went forward. McLean communicated this understanding to Mangan, who responded, "'absolutely' . . . meaning we would work it out."[3]

It was especially important that WGAE make its objections known because of its status as joint representative. The law is clear that joint bargaining representatives constitute a single de jure entity that acts as the exclusive bargaining representative for all employees in the bargaining unit. *International Paper*, 325 NLRB 689, 691 (1998) (citing *Pharmaseal Laboratories*, 199 NLRB 324, 325 (1972)). As such, the constituent unions of a joint representative are not, independently, parties to the collective-bargaining agreement; rather, they have the obligation to bargain on behalf of the unit employees on a joint basis and with one voice.

In *Pharmaseal Laboratories*, supra, the Board held that an existing contract barred a decertification petition, despite the fact that one of the unions of the joint representative denied the validity of the existing contract because it had been negotiated separately with the other union. The Board determined that the employer was justified in entering into a collective-bargaining agreement even though the agreement was negotiated and signed by only one of the unions. The Board found that, because the complaining union's representative had only attended 2 of nearly 25 bargaining sessions and had left the real negotiating responsibility to the other union, the other union "had the final authority to negotiate for, and bind the joint representative to, the agreement ultimately reached with the Employer; the Employer was led to believe that this was the case." *Pharmaseal Laboratories*, 199 NLRB at 325.

Here, the Respondent also was justified in entering into the Duopoly Agreement in the circumstances of this case. Although Mangan acted as chief negotiator and primary voice for the joint representative during negotiations for the National Agreement, she abandoned that role once negotiations commenced for the Duopoly Agreement. After receiving notice of the ongoing negotiations, Mangan made no attempt to participate in, or to notify the Respondent of her objections to, those negotiations, leading the Respondent to believe that McLean had the final authority to negotiate for, and bind the joint representative to, the Duopoly Agreement.

The majority attempts to discount the applicability of *Pharmaseal* to this case. My colleagues argue that there was more evidence of acquiescence in *Pharmaseal* than is present here. That may be so, but those factual distinctions were not central to the Board's holding in *Pharmaseal*. Rather, as the Board's analysis makes

[2] During the negotiations for sideletter 15, the Respondent was in an SEC blackout period, making it unable to contact KCAL management to ascertain the composition and duties of its newsroom's work force.

[3] In her December 20 e-mail to McLean, Mangan acknowledged this agreement, and the accompanying obligation, to meet and discuss the duopoly issues.

clear, the union's *authority to negotiate* on behalf of the joint representative was of primary significance:

> Local 955 and Local 986 had the obligation to bargain on behalf of the unit with one voice. Once the Employer was given to rely on Summers' authority, and after numerous bargaining sessions based upon such good-faith reliance, we are satisfied that the Petitioner and Local 986 cannot now dispute the validity of the consummated agreement.

Here, the Respondent was also given to rely upon WGW's authority to negotiate the Duopoly Agreement on behalf of the joint representative. That reliance was justifiable under all the facts of this case, including the established principle that WGAE and WGW had an obligation to bargain "with one voice."

The foregoing facts support a finding that the joint representative is estopped from asserting that the Respondent was not authorized to negotiate and to execute the Duopoly Agreement without the participation of WGAE. The essence of estoppel is that a party may not induce another party to rely on the truth of certain facts, benefit from that reliance, and then controvert those facts to prejudice the other party. See, e.g., *Red Coats, Inc.*, 328 NLRB 205, 206–207 (1999). That is precisely what occurred here. The parties' contract anticipated further meetings and discussions concerning the KCAL merger, and the WGW representative who negotiated the Duopoly Agreement was instrumental in the negotiations on behalf of the joint representative that resulted in sideletter 15.[4] Sideletter 15 itself was included not in the text of the National Agreement, but as a sideletter to the Los Angeles Supplement. The Respondent and WGW had an established past practice of dealing with each other directly on issues pertaining to WGW's members, which sideletter 15 clearly did.

Moreover, the joint representative never protested to the Respondent that WGW's representative lacked the authority to negotiate the Duopoly Agreement, whereby the joint representative obtained for its members a 1-year moratorium on layoffs and an accelerated pay-parity schedule for the KCAL employees joining the unit. The joint representative cannot now controvert the impression it fostered through its silence and disclaim the Respondent's authority to negotiate and execute the Duopoly Agreement with WGW. The Respondent demonstrated an unreasonable lack of diligence by WGAE in the assertion of its rights, on which the Respondent reasonably relied, believing that it could negotiate the Duopoly Agreement with WGW. The Respondent should not now suffer prejudice from the lack of diligence so demonstrated.

Dated, Washington, D.C. December 8, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with the Writers Guild of America, East and Writers Guild of America, west as the joint exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Staff Promotion Writer/Producers now or hereafter employed by us in New York or Los Angeles and staff Newswriters now or hereafter employed in New York, Chicago or Los Angeles for network, regional and/or local AM or FM radio and/or television broadcasts and staff News Assignment Deskpersons and Writers now or hereafter employed by us at its Washington, D.C. Network News Bureau, and staff News Editors now or hereafter employed by us in New York, and staff Desk Assistants and Clerk-Typists now or hereafter employed by us in Chicago, and network staff Researchers now or hereafter employed by us in New York, and local

[4] The General Counsel argues, and my colleagues appear to agree, that, because sideletter 15 calls for meetings between "the parties," WGAE, as a party to the collective-bargaining agreement, necessarily had to participate in the negotiations. I disagree. As explained above, the parties to the National Agreement are the Respondent and the joint representative. WGAE and WGW individually are not parties to it. Under the circumstances presented in this case, WGAE led the Respondent to believe that WGW had the authority to negotiate the Duopoly Agreement on behalf of the joint representative.

Researchers now or hereafter employed by us in New York, and staff Graphic Artists now or hereafter employed by us in New York.

WE WILL NOT enforce or give effect to the Duopoly Agreement dated December 12, 2002.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Writers Guild of America, East and Writers Guild of America, west as the joint exclusive collective-bargaining representatives of the employees in the appropriate unit.

CBS BROADCASTING, INC.

Rita Lisko, Esq., for the General Counsel.
Mark W. Engstrom, Esq., for the Respondent.
Elizabeth Orfan, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City, New York, on February 26 and 27, and March 17, 18, 22, and 23, 2004. Upon a charge filed on April 11, 2003, a complaint was issued on July 2, 2003, alleging that CBS Broadcasting, Inc. (CBS or Respondent) violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on May 12, 2004.

Upon the entire record of the case,[1] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with offices in New York City, has been engaged in the operation of television broadcasting stations. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Writers Guild of America, East, Inc. (WGAE) and Writers Guild of America, West, Inc. (WGW) are labor organizations within the meaning of Section 2(5) of the Act.

[1] Respondent's motion to correct transcript is granted.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Since 1958, WGAE and WGW have been the joint collective-bargaining representatives of a single-nationwide unit of CBS newswriters, editors, and other employees located in New York, Chicago, Washington, and Los Angeles. The most recent collective-bargaining agreement is effective from April 2, 2002, through April 1, 2005.

2. Current collective-bargaining agreement

Negotiations for the current collective-bargaining agreement began on March 6, 2002.[2] CBS submitted proposal 7, which dealt with consolidation of operations. CBS was contemplating the acquisition of KCAL-TV, which would create a "duopoly" in the Los Angeles market. A duopoly is the ownership by a single entity of two television stations in the same television market. Leon Schulzinger, vice president of CBS, explained to the Unions' bargaining committee that since CBS already owned KCBS, it needed to settle arrangements as to WGA-covered employees at KCBS with noncovered employees at KCAL.

The Unions rejected proposal 7. At subsequent negotiating sessions, proposal 7 was further discussed but CBS claimed that it did not yet know all of the details of the acquisition. On March 21, Mona Mangan, executive director of WGAE, asked Schulzinger if he was looking for a contract reopener. He answered that he was not.

On April 6, Schulzinger presented a revised proposal 7 to the Unions' negotiating committee. That document began with the following italicized language: *"Conceptual outline subject to change as the duopoly plan evolves."* Mangan testified that the parties had agreed that the language would be removed. Harry Isaacs, senior vice president of CBS, testified that the parties did not agree that the language should be removed. Schulzinger testified that it was he who removed the language and that "under my normal routine for drafting, language at the top of the agreement in italics is not intended to be contract language per se."

On April 7, the parties reached agreement on the collective-bargaining agreement. John McLean, executive director of WGW, stated that the agreement served as a "template " for future duopolies. The final written agreement was signed by the parties on November 18 and early December. The final signed agreement did *not* contain the statement in sideletter 15, "Conceptual outline subject to change as the duopoly plan evolves."

3. Sideletter 15

On May 15, the acquisition of KCAL was consummated. The decision was made that the KCAL employees would be moved to the KCBS location. Chuck Marchese, the representative of WGW, had concerns about the physical construction involved. A meeting was set up with WGW and CBS representatives for September 13. Schulzinger testified that at the September 13 meeting CBS intended to bring up its dissatisfaction

[2] All dates refer to 2002, unless otherwise specified.

with the provisions of sideletter 15. Schulzinger testified that Marchese was "taken by surprise" when he learned of CBS's intention to negotiate changes to the agreement and that he told the CBS representatives that he was not prepared to engage in the negotiations that CBS contemplated.

Mangan testified that on November 8 she received a telephone call from McLean who told her that he had been talking to Isaacs about producers writing and about removing them from the unit. Mangan testified that she told McLean, "[Y]ou can't do that, John." She testified that they began "yelling at each other" and she hung up. Ann Toback, assistant counsel of WGAE, testified that the conversation between Mangan and McLean took place on November 7. McLean testified that the conversation took place on September 17 or 18 and ended up in a "screaming match." On November 8, Mangan sent the following e-mail to McLean:

> Please do not take any action to alter the WGA-CBS collective-bargaining agreement with regard to its scope or jurisdictional clauses or other provisions regarding producers writing. Any such change would fundamentally alter the collective-bargaining agreement. We should convene a national council meeting to consider such changes. You should not feel free to alter unilaterally the collective-bargaining agreement to which both east [and] west are signatory.

Schulzinger testified that McLean told Isaacs and himself that Mangan objected to the making of any changes in sideletter 15. However, CBS continued to negotiate with WGW despite WGAE's objections. On November 22, CBS and WGW held a negotiating session. McLean proposed a new job title, which had never been used before, namely, supervisory writer/producer. This new position would not be in the unit. Schulzinger admitted that for many years, while negotiating with WGAE, CBS wanted writer/supervisors out of the unit, while WGAE insisted that they remain in the unit.

On December 20, Mangan sent the following e-mail to McLean:

> I . . . request[ed] that you not pursue bargaining with CBS without both parties participating. The contract states that the parties and employees will meet during the transition period and thereafter to discuss the plans, issues and questions related to the merger of the newsrooms. The Writers Guild of America, East is one of the parties. You may not bargain without us. . . . Please understand that you may execute nothing which impacts the collective-bargaining agreement.

Despite Mangan's objections, CBS and WGW entered into a Duopoly Agreement which revised sideletter 15. McLean signed the agreement on behalf of WGW on December 31, 2002, and Schulzinger signed on behalf of CBS on January 6, 2003. Isaacs conceded that the creation of a new position called supervisory writer/producer was a "substantive" change.

B. Discussion and Conclusions

1. Section 10(b)

Respondent contends that the complaint should be dismissed pursuant to Section 10(b) of the Act because WGAE had knowledge of the alleged unfair labor practices more than 6 months before filing the charge. WGAE filed its charge on April 11, 2003. Toback and Mangan testified that the original phone call from McLean was either November 7 or 8, 2002. McLean testified that the conversation took place on September 17 or 18. I credit Toback's and Mangan's testimony. On November 8, Mangan sent an e-mail to McLean advising him "not to take any action to alter the WGA-CBS collective-bargaining agreement." If the conversation took place on September 17 or 18, it is highly unlikely that Mangan would wait for 2 months to advise McLean that his proposed negotiations were unacceptable. It is more plausible that Mangan's e-mail was sent one or 2 days after the volatile conversation. I find that the conversation took place on November 7 or 8, well within the 10(b) period.

A statement of intent to commit an unfair labor practice does not start the running of the 10(b) period. The 10(b) period starts only when a party has a clear and unequivocal notice of a violation of the Act. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). The burden of showing such clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b). *Chinese American Planning Council*, 307 NLRB 410 (1992); *Allied Production Workers Local 12 (Northern Engraving Corp.)*, 331 NLRB 1, 2 (2000). I find that Respondent has not satisfied its burden.

2. Preamble to proposal 7

Proposal 7 began with the following italicized language: "*Conceptual outline subject to change as the duopoly plan evolves.*" Respondent argues that because of this language it had the right to enter into substantive negotiations with WGA after the collective-bargaining agreement had gone into effect.

Mangan testified that the parties agreed to remove the "conceptual" language. Isaacs testified that that no such agreement was reached. I find no persuasive reason to credit one witness over the other and, therefore, do not believe that I need to make a credibility resolution as to whether in fact is was agreed to remove the "conceptual" language. See *National Telephone Directory Corp.*, 319 NLRB 420, 422 (1995).

More importantly, however, Schulzinger testified that he was not looking for a reopener provision. In addition, he testified that it was he who removed the "conceptual" language and that language at the top of a provision in italics is not intended to be part of the agreement. I credit Schulzinger's testimony and find that it was he, the representative of CBS, who removed the provision and that it was never intended to be part of the agreement.

3. Modification of sideletter 15

WGAE and WGW were joint collective-bargaining representatives. No substantive modification to the collective-bargaining agreement could be made without the involvement of both WGAE and WGW. The final executed agreement does not contain the "conceptual" language and there is no reopener clause. Accordingly, WGAE was under no legal obligation to bargain over any mid-term modification.

The General Counsel has cited the case of *California Nevada Golden Tours*, 283 NLRB 58 (1987), where it was held that respondent violated Section 8(a)(1), (2), and (5) of the Act by negotiating and implementing a successor collective-bargaining

agreement with one of the unions of a joint collective-bargaining representative. CBS argues that that case is distinguishable because in the instant proceeding it is well established that WGAE deals with east coast matters and WGW deals with west coast matters. CBS has elicited much testimony concerning instances when either WGAE or WGW has dealt alone with its own constituents. However, in these cases generally the matters involved are minor in nature. Thus, for example the collective-bargaining agreement provides for time limits during which temporary employees may be employed. On numerous occasions one of the two Unions, by itself, has signed written waivers permitting CBS to employ a particular individual for a slightly longer time period. Or, over the years one of the two Unions would separately agree to "buyouts" whereby the employee would receive a severance package different from that specified in the collective-bargaining agreement. But these are minor adjustments. As Isaacs conceded the addition of a new position called supervisory writer/producer was a "substantive" change. This clearly could not be done without the active involvement of both Unions.

4. Waiver

CBS contends that WGAE waived its right to bargain by not requesting that CBS cease bargaining with WGW. It is well established that any waiver of a representative's right to bargain must be "clear and unmistakable". *General Electric Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969), cert. denied 396 U.S. 1005 (1970). CBS was aware that Mangan objected to any modification to sideletter 15. Respondent's negotiating with WGW and entering into a substantive modification of sideletter 15 with WGW constitutes a violation of Section 8(a)(1) and (5) of the Act. See *Ozanne Construction Co.*, 317 NLRB 396, 399 (1995), enfd. 112 F.3d 219 (6th Cir. 1997).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. WGAE and WGW are the joint exclusive collective-bargaining representatives of Respondent's employees in the appropriate unit.

4. Respondent violated Section 8(a)(1), (2), and (5) of the Act by negotiating with WGW and executing the Duopoly Agreement with WGW.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, CBS Broadcasting, Inc., New York City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize WGAE as the joint exclusive collective-bargaining representative of the employees in the appropriate unit.

(b) Recognizing WGW as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(c) Enforcing or giving effect to the Duopoly Agreement dated December 12, 2002.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold recognition from WGW as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit, provided, however, that nothing in this Order shall prohibit Respondent from dealing with WGW on non-substantive matters, consistent with past practice.

(b) Recognize, and on request, bargain with both WGAE and WGW as the joint exclusive collective-bargaining representatives of the employees in the appropriate unit.

(c) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 8, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 29, 2004

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize Writers Guild of America, East as the joint exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT recognize Writers Guild of America, west as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT enforce or give effect to the Duopoly Agreement dated December 12, 2003.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold recognition from Writers Guild of America, west as the exclusive collective-bargaining representative of the employees in the appropriate unit. However, CBS shall not be prohibited from dealing with Writers Guild of America, west on nonsubstantive matters, consistent with past practice.

CBS BROADCASTING, INC.